

**BOARD OF ALIEN LABOR CERTIFICATION APPEALS  
UNITED STATES DEPARTMENT OF LABOR  
WASHINGTON, D.C.**

**'Notice: This is an electronic bench opinion which has not been verified as official'**

DATE: December 24, 1996

CASE NO: 95-INA-246

**In the Matter of:**

**EDY HERNAN PERLA,  
Employer,**

**On Behalf of:**

**JUANA ANTONIA LOPEZ  
Alien**

Appearance: G. G. Salvador, Esq.  
Los Angeles, California,  
for the Employer and the Alien

Before: Huddleston, Holmes, and Neusner  
Administrative Law Judges

FREDERICK D. NEUSNER  
Administrative Law Judge

**DECISION AND ORDER**

This case arose from an application for labor certification on behalf of Alien JUANA ANTONIA LOPEZ ("Alien") filed by Employer EDY HERNAN PERLA ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, denied the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 CFR § 656.27(c).

#### STATEMENT OF THE CASE

**Procedural background.** On February 8, 1993, the Employer filed an application for labor certification to enable the Alien, a Salvadoran national, to fill the position of child monitor in her home in Los Angeles, California.

The duties of the housekeeper job offered were described as follows:

renders care to 2 children ages 10 and 8. Boys ( ) girls( ). keeps their quarters clean. Supervises their activities cares for them while adults are out. Meal pre for fam. of \_\_\_\_ Cleans houses while children are sleeping. NOn-smoking/drinking drg work-(no drugs) written ver. refs-full time basis.

By way of other special requirements the Employer specified, "works holidays or weekends," but Employer specified that the worke'rs hours would be 8:00 A.M. to 5:00 P.M., in a 40 hour week with overtime "If nec." The basic wages would amount to \$310 per week and overtime would be "\$ 1.5 per hour."<sup>1</sup> The application did not state any minimum education for the worker to perform satisfactorily the job duties described above, but three months of experience in either the job offered as a child monitor or a related occupation was noted in the Employer's application. AF 50. The Employer indicated that the Employer's previous effort to recruit U. S. workers consisted of "oral inquiry thru friend and neighbor." AF 51.

On April 30, 1993, the Employer amended and added to the application the assertions of the following letter:

---

<sup>1</sup>While the overtime rate is not clearly stated and could be interpreted as \$1.50 per hour, in this context it will be taken to mean one and one-half times the stated hourly rate.

Please be informed that there are two boys in this household and 5 family members.

~~Also, please take note that I am willing to amend the wage over to \$350.00 per week. EDD~~

For your information worker will be hired full time until she is legally admitted into this country as a permanent resident, in the meantime she works temporary for me. She works two or three times a week when needed therefore I do not need to comply with the HOUSEHOLD EMPLOYERS GUIDE.

Mrs. Juana Lopes started working for me since she obtain her work permit in 1992.

AF 52 (The strike out indicated above is in the original document of record).

On July 8, 1993, the Employer was sent resumes by three persons who responded to the advertisements.<sup>2</sup> AF 63-64. The Employer reported that she had interviewed two of the three applicants on July 21st and 24th, and that the third person did not appear at the interview.<sup>3</sup> She reported on August 14, 1993 that both of the persons she interviewed rejected the job as they did not want to cook. AF 56. Analysis of this report suggests that the job duties in the application and advertisement were not the same as the position offered in these interviews. Employer's report indicates she told both interviewees that their duties included both care of the children and "meal preparation." From this it is inferred that the job offered in the interviews included the requirement that meals were to be made for the entire family. This is based on the inferences drawn (1) from the Employer's application, which indicated, "Meal pre for fam. of \_\_\_\_," (2) from the letter of April 30, 1993, which expressly stated that the household included the two boys to be monitored and "5 family members," and (3) from the "Employment Contract" of August 4, 1994, which stated the worker's duties to be "housekeeping tasks and child care including cooking." AF 07. As the recruitment advertisement did not tell the two interviewees that the position would require any person Employer hired to monitor two children, clean the Employer's house, and cook meals for a family of five, the negative responses that Employer reported when they were interviewed appear to have arisen from incomplete, contradictory, and deceptive statements concerning the job duties.

---

<sup>2</sup>Neither the newspapers nor the dates these advertisements were published are given in this record. AF 65-67.

<sup>3</sup>Employer noted that the letter to the third applicant was returned unclaimed, and the telephone number given in the resume was disconnected.

Later on September 3, 1993, the CO returned the Employer's application of February 8, 1993, as incomplete, citing 20 CFR § 656.21(21)(h).<sup>4</sup> The record included a further letter noting that on October 18, 1993, the Employer had lost the resumes the CO sent in referring the U.S. workers, and an order that cancelled the application when she declined to accept responsibility under the regulations. This and similar procedural defects appeared satisfied by a refiling process that was not documented. After the CO's January 31, 1994, Notice of Finding ("NOF") cited procedural and substantive defects, Employer readvertised the position on April 8, 9, and 10, 1994. AF 30-34, 44-48.<sup>5</sup> The readvertisement produced four resumes of job seekers of whom the Employer was notified on May 4, 1994. These U. S. workers then were notified by certified mail on April 26, 1994, that they would be interviewed on April 28, 1994. AF 12-27.<sup>6</sup> The CO issued a supplemental NOF on July 13, 1994, which repeated the previous defects and gave the Employer a month to revise or correct the record supporting her application. AF 08-10.

By his September 16, 1994, Final Determination (FD), the CO declined certification on grounds that the position in existence was parttime, that the position included restrictive requirements that were inconsistent with the work of a child monitor, and that the Employer's recruitment effort was incomplete on both occasions when the job was advertised.

**Discussion.** After sifting through Employer's descriptions of the position offered, it becomes clear from the rebuttal that the worker to be hired would be more than a child monitor, and that the housekeeping functions and cooking were of greater importance to this applicant. AF 04-05.<sup>7</sup> For the reasons that the panel stated in **Joan Bensinger**, 89-INA-052(October 30, 1989), it is

---

<sup>4</sup>On September 20, 1993, the Employer moved for reconsideration of the closing of the case. AF 53.

<sup>5</sup>The NOF noted the unclear statements about the work that the job required in addition to monitoring the children as a restrictive requirement. In addition, the Employer's recruiting effort was faulted as untimely and incomplete. AF 17-29.

<sup>6</sup>The date was later reset for the first week of May 1994, but the Employer did not report that such interviews actually took place as rescheduled. Much later the Employer reported on August 3, 1994, that he called the workers on July 30, 1994. AF 04. This seems to have been the only follow up Employer made. Three of the applicants said they were not interested in the job, and, he said, the telephone of the fourth was disconnected. AF 04; and see AF 11-16.

<sup>7</sup>The brief does not clarify the Employer's confusion of objective and simply seeks a waiver that will vitiate the refusal of the CO to "afford credence" to the Employer's corrected application, despite its defects.

fundamental that the proposed position must provide permanent, fulltime employment for the alien worker on whose behalf the application is filed. 20 CFR § 656.50; and see **Gerata Systems America, Inc.**, 88-INA-344(December 16, 1988). As in **Joan Bensinger**, supra, this Employer eventually agreed that the assigned duties of an average eight and one-half hour day would require the worker to spend three and one-half hours preparing, serving, and cleaning up after meals. Two hours would be spent cleaning house, including daily bed making, dusting, cleaning bathrooms, cleaning the kitchen, and similar work. One hour would be spent in laundry work that consisted of washing, ironing and hand washing. Three quarters of an hour would be spent shopping with the wife of the house for food and miscellaneous items; three quarters of an hour would be spent on "breaks and meals" for the employee, herself; and, finally, three quarters of an hour would be spent on duties that the Employer described as "Miscellaneous" [sic], in which the worker's job was "SUPERVISE CHILDREN w/homework, etc." and "TAKES GARBAGE OUT." AF 04-05.

As less than three-quarters of an hour a day or less than four hours per week were to be devoted to monitoring the children, the CO correctly found the position offered by the Employer to be part time employment.<sup>8</sup> **Randy Auerbach**, 88-INA-103, (April 7, 1988). For this reason it is concluded that Employer's proposed position does not constitute a bona fide job opening for full time employment. It follows that certification must be denied for this reason, alone.

The CO pointed out further, however, that the requirement that the duties of child monitor also included providing meals for the whole family was unduly restrictive, as it was not normal to this occupation. The CO added that the Employer did not document the representation that the work of a child monitor normally includes the requirement that she cook for the entire family or that such work is normal to the occupation. Upon examining the entry for classification 301-677-010 under "child monitor" in the Dictionary of Occupational Titles of the Employment and Training Administration of the U. S. Department of Labor it is observed that the finding of the CO correctly noted the normal usage of this occupational specialty in the United States.<sup>9</sup>

---

<sup>8</sup>Moreover, when the Alien's signature on the application and academic qualifications were noted in her qualifications statement it is observed that any help she might be able to give the children in their homework was problematical at best. AF 75-76.

<sup>9</sup>As this definition also indicates that when employment is on a daily or hourly basis the occupation is called "baby sitter," this source also corroborates the finding supra that the position description is unduly restrictive.

Finally, the CO's denial also was based on the Employer's failure to furnish documentation to support her contention that recruitment for this job was carried out in good faith. The CO observed, "Your recruitment actions show this position is not clearly open to any qualified U. S. worker." AF 03. 20 CFR §§ 656.20(c)(8), 656.24(b)(2)(ii). For the reasons discussed above, the CO's finding in this regard also was correct.

Accordingly, the following order will enter.

#### **ORDER**

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

---

FREDERICK D. NEUSNER  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W.  
Suite 400  
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

## BALCA VOTE SHEET

Case Name: **EDY HERNAN PERLA**  
**(Juana Lopez)**

Case No. : 95-INA-246

PLEASE INITIAL THE APPROPRIATE BOX.

	:	:	:	:
	:	CONCUR	:	DISSENT
	:	:	:	COMMENT
	:	:	:	:
Holmes	:	:	:	:
	:	:	:	:
	:	:	:	:
Huddleston	:	:	:	:
	:	:	:	:
	:	:	:	:

Thank you,

Judge Neusner

Date: